IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

MACA.No. 1078 of 2005()

OP(MV) No.566/1999 of MOTOR ACCIDENT CLAIMS TRIBUNAL, MUVATTUPUZHA

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APPELLANT/1ST RESPONDENT:

PAULOSE, ATHITHOTTATHIL HOUSE,
MARKET P.O., MUVATTUPUZHA.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENTS:

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1. VINU, S/O. SIMON,
MADAPPIKUNNEL HOUSE, VAZHAPPILLY KARA,
EAST VEZHAPPILLY P.O.

2. SHYJO, S/O. PAULOSE,
ATHITHOTTATHIL HOUSE, EAST VAZHAPPILLY KARA,
EAST VAZHAPPILLY P.O.

3. UNITED INDIA INSURANCE COMPANY LIMITED
MUVATTUPUZHA BRANCH.

BY FOR R3 ADV. SRI.P.M.M.NAJEEB KHAN

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 12/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

M.A.C.A.NO.1078 OF 2005 (C)

Dated this the 12 th day of February, 2007.

J U D G M E N T

The owner of autorikshaw KL 7/S 5520 involved in a motor accident on 27.6.98 causing injuries to first respondent, is the appellant. The Motor Accident Claims Tribunal, Moovattupuzha awarded a compensation of Rs.16,000/- and directed third respondent to pay the compensation and allowed insurance company to realise it from appellant. The Motor Accidents Claims Tribunal holding that second respondent, the driver was not authorised to drive an autorikshaw under Ext.B1 insurance policy, held that due to violation of policy conditions, the insurance conpany is entitled to realise the amount paid to the claimant from appellant, the insured. Third respondent has already remitted the amount with interest. The case of the appellant was that Tribunal did not consider the question whether absence of a badge by second respondent was the cause of the accident and unless it was the cause of the accident, insurance company cannot be exonerated from its liability to compensate appellant and therefore that portion of the award is to be set aside. Appellant did not appear or contest the case before the Tribunal. Tribunal passed the award accepting the contentions of third respondent and relying on Ext.B2 insurance policy and Ext.B1 driving licence.

2. Learned counsel appearing for appellant and third respondent were heard.

3. Learned counsel for appellant relying on the decision of Apex court in *National Insurance Company vs. Swaran Singh (2004 (1) KLT 781)* and Division Bench of this court in *Ramachandran vs. Unnikrishnan (2006 (2) KLT 15)* argued that mere absence of a badge to drive a commercial vehicle is not sufficient to exonerate the insurance company from its liability under Ext.B2 policy and no evidence was adduced before the Tribunal to show that absence of badge was either the cause of accident or that it contributed to the accident and therefore Tribunal should not have granted an award in favour of third respondent to realise the amount paid to first respondent/claimant from appellant. Learned counsel appearing for third respondent relying on the decision of Apex court in *National Insurance company vs. Kusum Rai (2006 (2) KLT 300)* argued that facts are identical, where the driver was not holding licence to drive a commercial vehicle and Apex court permitted the Insurance company to realise the amount paid to the injured from the insured and therefore the appeal is only to be dismissed.

4. Apex court in Swaran Singh's case considered the liability of the insurance company to pay compensation due to an injured in a motor accident, even in cases of violation of policy conditions. Thier Lordship summarising the findings in paragraph 102 clause (vi) held;

> "Even where the insurer is able to prove breach on

> the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under S.149(2) of the Act."

5. Though it was held that mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not in themselves defences available to the insurer against either the insured or third parties and to avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of policy regarding use of vehicles by duly licenced driver or one who was not disqualified to drive at the relevant time and whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, does not fulfill the requirements of law or not will have to be determined in each case,

it was held that to avoid its liability towards insured, the insurer has to establish that the said breach or breaches of condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. Therefore the fact that second respondent driver was not holding a badge by itself is insufficient to exonerate the insurance company from its liability to the insured. Even if second respondent was not holding a badge, unless the said breach of condition of the driving licence was so fundamental as to have contributed to the accident, insurer cannot be exonerated. In Kusum Rai's case, relied on by learned counsel appearing for third respondent, it was held that, the question whether the driver did not possess any licence to drive a commercial vehicle and so there was breach of conditions of the contract of insurance is a defence available to the insurance company. It was not held that for the reason it was a defence, insurance company is entitled to be exonerated in all cases. Quoting the dictum in Swaran Singh's case their Lordship relied on a decision of the Division Bench in *National Insurance Corporation Ltd. vs. Kantidevi (2005 (5) SCC 789).* In that case Apex court remanded the case back to the Tribunal, permitting parties to lead such further evidence to prove the facts as directed in Swaran Singh's case. But that course was not followed considering the peculiar circumstances of the case, finding that the owner did not appear and the injured was a 12 year old boy. Therefore Kusum Rai's case cannot be taken as a precedent to hold that absence of a badge

by itself is sufficient to exonerate the insurance company from avoiding its liability to the insured under the insurance policy. As held in Swaran Singh's case, unless that breach of condition is found to have contributed to the cause of accident, insurance company is not entitled to be exonerated. Appellant did not contest the case before the Tribunal. In such circumstances Tribunal did not consider the question in the light of the dictum laid in Swaran Singh's case. Interest of justice warrants that an opportunity shall be granted to the parties to let in evidence in support of the respective contentions.

6. The appeal is allowed. Award passed by Motor Accident Claims Tribunal, Moovattupuzha in O.P.(M.V) 566/1999 is set aside to the extent of the liability of appellant/first respondent and the permission granted to third respondent insurance company to realise the amount from appellant. Motor Accident Claims Tribunal is directed to consider the question whether the violation of the policy condition, as claimed by third respondent, is sufficient enough to exonerate third respondent and enable third respondent to realise the compensation paid to first respondent from appellants in the light of the decision of the Apex court in Swaran Singh's case.

Even though learned counsel appearing for appellant challenged the quantum of compensation and prayed that the said question may also be left opened to be decided by the Tribunal in the circumstances of the case, I do not find that it is in the interest of justice to interfere with the quantum of

compensation awarded. Appellant and third respondent are directed to appear before the Tribunal on 28.3.2007.

M.SASIDHARAN NAMBIAR,
JUDGE.

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ORDER ON I.A.2000/2005 IN M.A.C.A.NO.1078/2005

DISMISSED.

12.2.2007 SD/- M.SASIDHARAN NAMBIAR, JUDGE.

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P.A. TO JUDGE.